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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 106

W. D. SANDERS, PETITIONER,

vs.

ARMOUR FERTILIZER WORKS AND NATIONAL FIRE INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

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No. 106

W. D. SANDERS, PETITIONER,

vs.

ARMOUR FERTILIZER WORKS AND NATIONAL FIRE INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States:

Now comes W. D. Sanders, whose domicile is in Bowie County, Texas, and respectfully petitions this Honorable Court to issue its most gracious writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, for the purpose of reviewing a judgment rendered by the majority of said court on March 10, 1933, in a certain cause styled and numbered in said court No. 6796, *Armour Fertilizer Works, Appellant,* v. *W. D. Sanders et al., Appellees; Armour Fertilizer Works, Appellant,* v. *W. D. Sanders et al., Appellees,* Consolidated Cases.

Questions Presented for Review.

1. Whether a United States District Court has the right, in enforcing the full faith and credit clause of the United States Constitution, to substitute for the decision of the Supreme Court of Illinois, interpreting its own laws, that the institution of a garnishment suit within that State and under its laws, prior to and without the rendition of final judgment therein, is entitled to no faith and credit in the courts of a sister State, its own interpretation of the proper effect of such inchoate procedure, and to give to such incomplete judicial proceeding, in Texas, the effect of a final judgment awarding the entire debt against which the garnishment was run to the satisfaction of the claim sued upon, but never established by final judgment in Illinois.

2. Whether a United States District Court, sitting in Texas, whose jurisdiction has been invoked in interpleader to determine the priority of right to a fund of money deposited in its registry, as between two claimants, neither of whom has obtained a judgment for the fund, and both of whom are personally subject to its jurisdiction, is bound by the full faith and credit clause to disregard the right of exemption accorded to a Texas citizen by the Constitution and laws of that State against any form of attachment or garnishment of his homestead and household goods, in favor of a claimant upon a promissory note executed and payable in Texas, who has resorted to the courts of another State in order to defeat the exemption laws of Texas.

Statement of the Nature and Result of the Suit to Date.

This suit originated upon two separate petitions of interpleader filed respectively by respondents, the National Fire Insurance Company, and Hartford Fire Insurance Company, in the United States District Court for the East-

ern District of Texas, Texarkana Division, against W. D. Sanders, the petitioner herein (hereinafter called "Sanders"), and Armour Fertilizer Works (hereinafter called "Armour"), which suits were brought under Title 28, U. S. C. A., Sec. 43, paragraph 26. At an early date in the proceedings the two cases were consolidated, and have at all times thereafter been treated as one case.

Prior to July 3, 1927, the insurance companies had issued fire insurance policies to Sanders covering a dwelling house and the furniture therein situated in De Kalb, Texas. On that date the house and furniture were destroyed by fire, and by subsequent settlement agreement between Sanders and the respective companies, the liability of the companies was fixed at $3,400 as to the National Fire Insurance Company, and at $4,250 as to the Hartford Fire Insurance Company (R. 6, 12).

On July 18, 1927, Armour filed a suit against Sanders in the Municipal Court of Cook County, Illinois, based upon promissory notes dated at De Kalb, Texas, and payable in Fort Worth, Tarrant County, Texas, aggregating $7,589.81 (R. 89). Service of process was had on Sanders in that suit by publication of notice of the filing of the suit, as provided by the laws of Illinois (R. 113, 114) and by the mailing of a copy of said notice to Sanders by the Clerk of the Court (R. 112). No personal service was secured upon Sanders within the State of Illinois, nor did Sanders ever enter a personal appearance in said cause (R. 85).

In connection with said suit against Sanders, Armour also filed an attachment bond and caused writs of attachment to be served upon the two insurance companies on July 19, 1927 (R. 105).

On July 25, 1927, Hartford Fire Insurance Company filed its answer to written interrogatories propounded to it in said cause, denying that it was indebted to Sanders

or that it had in its possession any properties or effects belonging to him (R. 107-110).

On September 19, 1927, an interlocutory judgment by default was entered against Sanders in said suit, which order recited that "the attachment herein be and it hereby is sustained," and gave Armour judgment against Sanders for $7,589.81, together with court costs (R. 115-116).

On June 27, 1928, National Fire Insurance Company filed its answer in said cause, admitting an indebtedness to Sanders in the sum of $3,400, but pleading that said indebtedness was exempt to Sanders from garnishment or attachment under the provisions of the Constitution and Statutes of Texas (R. 117-125). On the same date Hartford Fire Insurance Company also filed its amended answer, admitting its indebtedness in the sum of $4,250, and likewise pleading the Texas exemption of said indebtedness (R. 125-131). No further action appears to have ever been taken in said Illinois suit.

On June 12, 1928, the insurance companies filed the present interpleader suits in the Eastern District of Texas, Texarkana Division (R. 10, 18) alleging that Armour had instituted garnishment proceedings against them in Chicago, and that Sanders was threatening to sue them in Texas under the claim that the indebtedness arising under the respective policies of insurance was exempt to him under the Constitution and Statutes of the State of Texas, as construed by its Supreme Court.

Pursuant to these petitions, said United States District Court enjoined Armour from further prosecution of its suit in Chicago on July 2, 1928 (R. 69-70). The record does not show it, but the district judge subsequently entered an order dismissing both bills of interpleader (33 Fed. (2) 157). The insurance companies perfected a joint appeal from the order of dismissal, which appeal was determined

in their favor by the Circuit Court of Appeals for the 5th Circuit (38 Fed. (2) 212), and the cause was remanded with instructions to the district court to sustain the bill. Pursuant to this decree, the district court on September 14, 1931, entered an order in this cause, sustaining the bills of interpleader (R. 72-74), the case was tried on the merits of the respective claims of Sanders and of Armour, and on August 6, 1932, decree was entered in the District Court awarding both of the funds in controversy to Sanders and taxing certain items of costs against the impounded funds and other items against Armour (R. 200-201). The only contested issue of fact on this trial was the contention of Armour that Sanders had abandoned his homestead prior to the fire, which question was resolved against Armour by the district judge upon competent evidence (R. 194). We do not find this decision of the district court reported in the Federal Reporter system.

In due time Armour perfected an appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit at New Orleans. The appeal was submitted to said court on January 17, 1933, and on March 10, 1933, Judges Bryan and Sibley of said court rendered judgment upon said appeal, and ruled that the impounded funds should be applied first to the extinguishment of the "judgment" rendered against Sanders in the garnishment proceeding, and the remainder, if any, paid over to him. On March 22, 1933, Judge Hutcheson of said court rendered his opinion dissenting from the opinion of the majority, and on March 27, 1933, within the period allowed by the rules of said court, Sanders filed his motion for a rehearing of said appeal, which motion was overruled without opinion on April 1, 1933. Sanders now asks this Honorable Court for a writ of certiorari to review this judgment of the circuit court of appeals.

Reasons for Granting this Petition.

The question as to what effect, if any, has to be given by a Federal court sitting in Texas in an interpleader suit to a garnishment proceeding instituted in Illinois, but the further prosecution of which has been permanently enjoined by such Federal court prior to the rendition of judgment therein, is an important question of Federal law which has not been, and which should be definitely settled by this Honorable Court.

In *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538, this Honorable Court held that a garnishment proceeding instituted in the State of New York did not, without the rendition of final judgment therein, confer upon the plaintiff in garnishment any rights which were entitled to full faith and credit in the State of Massachusetts. That case did not arise as an interpleader suit, but we believe, nevertheless, that the judgment of the circuit court in this case, holding, as it does, that the mere institution of a garnishment proceeding, without the rendition of final judgment therein, creates a vested right to the garnished debt which must be recognized and enforced in other States of the Union, even though in violation of their public policy, is in conflict with and in violation of said opinion of this Honorable Court in *Cole* v. *Cunningham*.

A further important question as to conflict of remedial rights is presented in this case in the fact that, by the laws of the State of Texas, in which State this suit was tried, the garnished debt is exempted to the principal debtor, whereas had the garnishment suit gone to final judgment in Illinois, the courts of that State would have refused to honor the exemption accorded to such debtor by Texas law. The decision of the circuit court below, holding that under such circumstances the Texas court, trying this case in Texas, must enforce the remedial laws of Illi-

nois, even though in conflict with and in derogation of the exemption rights accorded to petitioner Sanders under the law of the forum, is directly in conflict with prior decisions of this Honorable Court in the cases of *Scudder* v. *Union Central National Bank,* 91 U. S. 406, 23 L. Ed. 245; *Pritchard* v. *Norton,* 106 U. S. 134, 27 L. Ed. 107, 1 Sup. Ct. Rep. 102, and *Bank of U. S.* v. *Donnally,* 8 Peters 361, 8 L. Ed. 974, in all of which cases the principle of law common to all judicial systems, that all matters of remedial law are governed by the law of the forum, is accepted and adopted. Such decision on this point is also in conflict with the decision of this Honorable Court in *Cole* v. *Cunningham, supra,* wherein this Honorable Court held that while the United States Constitution requires the several States to give general validity, faith, and credit to the judgments of sister States as evidence, it does not confer upon such judgments or proceedings the right of priority or privilege of lien which they held in the State where they were pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments. We submit that in this particular, said judgment of the circuit court is wholly without precedent, and is opposed to the uniform, prior expressions of this Honorable Court on this point.

It seems to us, also, that several erroneous statements upon important principles of general law made by the majority of the circuit court should be reviewed and corrected by this Honorable Court. On page 280 of the record, Judge Sibley says:

> "We do not think the filing of the Federal interpleader and the payment thereunder of the money into the District Court in Texas operated to bring it under the dominion of Texas law. The applicant for interpleader often has a choice of forum, and he cannot at his will subject the rights of the contesting claimants

to one set of laws rather than another. The purpose of the interpleader statute was to give the stakeholder protection, but in nowise to change the rights of the claimants by its operation. The interpleader is a suit in equity, and equitable principles and procedure are the same throughout the Federal jurisdiction. The court is to weigh the right or title of each claimant under the law of the State in which it arose, and determine which according to equity is the better. The decision should be the same whether the interpleader is filed in Illinois or in Texas."

As we have previously pointed out, this statement is, in effect, a denial of the principle of law above referred to that all matters of remedial law are determined according to the law of the forum. Garnishment is purely a statutory remedy. The right of exemption is remedial and procedural. According to Texas law the remedy of garnishment is not available against the insurance proceeds of a homestead or of household goods of a Texas citizen. Article 16, Sec. 50, Constitution of Texas; Article 3832, R. C. S. of Texas; *Cameron* v. *Fay*, 55 Tex. 58; *Chase* v. *Swayne*, 88 Tex. 218, 30 S. W. 1049; *Travelers Insurance Co.* v. *Chase*, 31 S. W. 1103.

If the circuit court meant by the statement quoted above to say that the Texas exemption laws are not binding on a Federal *equity* court sitting in Texas, as distinguished from a trial on the law side of the docket, we believe the decision is in conflict with prior decisions of this Honorable Court in *Mason* v. *U. S.*, 260 U. S. 545, 67 L. Ed. 396, 43 Sup. Ct. Rep. 200; *Bronson* v. *Kinsey*, 1 Howard 311; *Lanahan* v. *Sears*, 102 U. S. 318, 26 L. Ed. 180, as well as with the principle of U. S. Equity Rule 23, requiring that law questions arising in a suit in equity be determined according to the principles applicable. We know of no prior Federal decision sustaining the statement of the circuit court that the Texas exemp-

tion laws are not binding upon a United States District Court in equity, sitting in Texas.

If the exception to the general rule is supposed to arise because of the fact that this is an interpleader suit, we know of no prior decision by any court undertaking to engraft such an exception upon the universal rule. The rule is stated by all the authorities in the most general terms and without exception. The only authority cited by the circuit court in support of its proposition is a prior decision of its own. *Vogel* v. *Thiesing*, 55 Fed. (2) 205, which in our opinion is not in point. The conflictng laws in that case were not procedural, but substantive, and there is no question but that any court, in passing upon the existence of substantive rights, must apply the law of the jurisdiction or jurisdictions in which those rights arose.

The principle above set out by the circuit court is not only in violation of well established judicial precedent, but if followed to its logical conclusion, it would substitute, for a fixed rule of law binding upon all courts within the jurisdiction, the principle of determining valuable property rights in interpleader suits, according to the personal preferences of the respective Judges as to what would be an equitable solution of the controversy. The District Judge might personally consider the Texas procedure to the more equitable. The circuit court might prefer the Illinois procedure. If the law of still a third State or country were involved, it is conceivable that on appeal to the Supreme Court the judges then composing such court might rule that while the lower courts had applied the correct principle of law, *i. e.*, to decide the case according to the most equitable remedial statute involved, nevertheless such judges were personally mistaken in considering either the Texas or the Illinois remedy as being more just than the remedy afforded by the law of such third State, and reverse the case on that ground. Under such a rule of law,

no one could tell in advance of decision by any court what the final decision would be. The case might be filed before a district judge who considered liberal exemption laws equitable, and before trial he might die and be replaced by a judge who considered all exemption laws to be inequitable. We believe it to be highly important that this attempt by the circuit court to arrogate to the judiciary the privilege of disregarding and of violating any sovereign law of the State which such court may consider to be inequitable should be rejected and denounced by this Honorable Court.

We submit, furthermore, that the holding by the majority of the circuit court in this case, that it is inequitable for a Texas citizen to insist upon the exemption rights conferred upon him by the laws of his home State, as against a creditor who extended credit to him upon a note executed and payable within the State of Texas, is contrary to the attitude of this Honorable Court as stated in *Holden* v. *Stratton*, 198 U. S. 214, as follows:

> "It has always been the policy of Congress, both in general legislation and in bankruptcy acts, to recognize and give effect to State exemption laws."

The Federal court sitting in Texas is just as much bound to enforce the public policy of the State as was the State court of Massachusetts in *Cole* v. *Cunningham*, and has just as much right to protect a citizen of Texas from an attempted evasion of his constitutional and statutory exemption rights as the State court of Massachusetts had to secure to its citizens the benefit of its insolvency laws.

The opinion of the circuit court has also decided another important question of general law in a manner in conflict with established precedent, in holding that Title 28, U. S. C. A., Section 687, meant, not that the judicial proceedings in Illinois were to be accorded the faith and credit in Texas which they were accorded under the law and usage of Illinois as interpreted by its Supreme Court, but that

where the Circuit Court of the Fifth Circuit thought that such Illinois decisions were erroneous, such judicial proceedings should be accorded the faith and credit to which such circuit court thought they should have been entitled in Illinois under a proper interpretation of its laws. We submit that such holding by the circuit court is in direct conflict with prior decisions of this Honorable Court, notably in *Robertson* v. *Pickrell*, 109 U. S. 608, 3 Sup. Ct. Rep. 407-408; *Union & Planters Bank* v. *Memphis*, 189 U. S. 71, 23 Sup. Ct. Rep. 605-606; and *Corrington v. First National Bank*, 198 U. S. 100, 25 Sup. Ct. Rep. 562, 564, in all of which cases this Honorable Court specifically laid down the rule that regardless of the rule prevailing in the courts of the United States, a judicial proceeding in a State could not be given greater force or effect outside of such State than the courts of such State themselves accorded to it.

We believe that the action of the circuit court in repudiating the general rule and the express language of the statute, and in giving to the Illinois proceeding a greater effect and credit in Texas than was accorded to it by the laws and usage of Illinois, is an important deviation from the general rule, which should not be ratified or sanctioned by this Honorable Court.

Finally, we believe it is important that this Honorable Court clarify once and for all the character of a garnishment proceeding as a personal action, rather than as a true proceeding *in rem*. The confusion which exists on this important point is manifest in the majority opinion of the circuit court below, in which, as aptly stated by Judge Hutcheson in his dissenting opinion (R. 234):

> "The majority holding to the confused notions of debt *situs* advanced in *Chicago & Rock Island R. R.* v. *Sturm*, 174 U. S. 170; *King* v. *Cross*, 175 U. S. 396, in determining jurisdictions in garnishments exploded in

Harris v. *Balk*, 198 U. S. 215, treat garnishment proceedings as now *in personam*, now *in rem*, and contrary to the universally recognized rule that priority of judgment rather than priority of garnishment controls, seeks to rest upon the universally denied theory that the garnishment impounded a *res* in Illinois, its conclusion that a lien was fixed there."

It will be noted that in *Harris* v. *Balk*, *supra*, this Honorable Court, on page 627 of the Supreme Court Reporter, cited with approval the case of *Lancashire Insurance Co.* v. *Corbetts*, 165 Ill. 592, 46 N. E. 631, in which case the Supreme Court of Illinois expressly held that the service of a writ of garnishment in Illinois did not confer upon the courts of that State exclusive right to deal with the garnished debt or debtor, and that such incomplete judicial proceeding prior to the rendition of final judgment therein was entitled to no faith or credit from the courts of other States. This is one of the Illinois decisions criticized by the circuit court of appeals as incorrectly interpreting the law and usage of Illinois.

We respectfully submit that there is so much confusion at the present time as to the effect of the service of a writ of garnishment without final judgment, especially where the debt sought to be garnished is subject to an exemption privilege at the domicile of the principal debtor, that this Honorable Court should grant a writ of certiorari in this case in order to clarify, once and for all, the nature and effect of such a proceeding.

WHEREFORE your petitioner respectfully prays that writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete tran-

script of the record and all proceedings in the case numbered and entitled on its docket No. 6796, Armour Fertilizer Works, Appellant, *vs.* W. D. Sanders *et al.*, Appellees, and that said decree of said Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

W. D. SANDERS,
By T. D. GRESHAM,
Dallas, Texas.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 106

W. D. SANDERS, PETITIONER,

vs.

ARMOUR FERTILIZER WORKS AND NATIONAL FIRE INSURANCE COMPANY.

BRIEF IN SUPPORT OF PETITION OF W. D. SANDERS FOR A WRIT OF CERTIORARI.

Prior Court Opinions in this Case.

The decision of District Judge Estes, dismissing the petitions of plaintiffs in interpleader in this case on June 15, 1929, is reported in 33 Fed. (2) 157.

On February 25, 1930, this decision was reversed by the Circuit Court of Appeals for the Fifth Circuit, and the cause remanded with instructions to sustain the bills in interpleader. 38 Fed. (2) 212.

We have been unable to find a Federal Report of the decision of District Judge Bryant, rendered on June 30, 1932, awarding the funds in controversy to petitioner W. D. Sanders. His findings of fact and conclusions of law appear on pages 192-195 of the record, and the decree itself on pages 200-201.

The decisions of Circuit Judge Sibley, rendered on March 10, 1933, for a majority of the Circuit Court of the Fifth Circuit, reversing the decision of Judge Bryant and remanding the case with instructions to award the funds in controversy to the satisfaction of the claim of Armour Fertilizer Works in preference to the exemption claim of petitioner W. D. Sanders, has not been reported as yet, nor has the opinion of Circuit Judge Hutcheson, dissenting from such majority opinion, been reported. The latter opinion was filed on March 22, 1933.

Sanders filed his petition for a re-hearing of said cause by said circuit court of appeals within the time fixed for such petition by the rules of said court, which petition was considered by said court and overruled by it on April 1, 1933, without written opinion.

Jurisdiction.

This Honorable Court has jurisdiction to consider the petition of W. D. Sanders for a writ of certiorari in this cause under the provisions of Title 28, U. S. C. A. Section 347. This petition is filed within three months after April 1, 1933, the date upon which petitioner's petition for a re-hearing was overruled by the circuit court of appeals, as well as within three months of the original decision in the case (March 10, 1933).

Statement of the Case.

The facts of the case have been fully stated in the petition for a writ of certiorari, pages 2-5, and said statement is referred to for the purposes of this brief.

Specification of Errors.

1. The circuit court erred in holding that the judicial proceeding instituted by Armour in Illinois, which under the laws and practice of that State merely gave rise to an

inchoate and defeasible claim upon the debt sought to be garnished, in an indeterminate amount so far as said garnishing plaintiff was concerned, must be honored in Texas as a definite and final judgment awarding the entire debt sought to be garnished to the satisfaction of Armour's claim.

2. The circuit court erred in announcing as an exception to the universally accepted rule of law that all matters of procedure, including the remedies of garnishment and exemption, in all characters and classes of actions, are to be governed wholly by the law of the forum, the principle that in interpleader suits the courts of the forum are free to disregard its procedural laws and to follow such procedural law, domestic or foreign, as may appeal to such court as reaching the most equitable result under the circumstances.

3. The circuit court erred in holding that it is the policy of the United States to aid a creditor to collect his claim against a debtor in violation of the exemption laws of the State of the debtor's domicile, and especially so in a United States District Court sitting within the confines of the State whose exemption laws the creditor is seeking to evade.

Authorities under First Assignment of Error.

28 U. S. C. A., Sec. 687.

Lancashire Insurance Co. v. *Corbetts*, 46 N. E. 631.

Becker v. *Ill. Central R. R. Co.*, 250 Ill. 40, 95 N. E. 42, 35 L. R. A. (N. S.) 1154.

28 C. J. 252.

Bigelow v. *Andress*, 31 Ill. 322.

McElwee v. *Wilce*, 80 Ill. App. 338, 342.

Robertson v. *Pickrell*, 109 U. S. 608, 3 Sup. Ct. Rep. 407.

Union & Planters Bank v. *Memphis*, 189 U. S. 71, 23 Sup. Ct. Rep. 604.

Covington v. *First National Bank*, 198 U. S. 100, 25 Sup. Ct. Rep. 562.
Free v. *Western Union Tel. Co.*, 147 N. W. 1040.
Bruce v. *Ackroyd*, 110 A. 835, 95 Conn. 167.
Black on Judgments, page 1039.
34 C. J. 1105.
15 R. C. L. 900.
Aldrich v. *Kinney*, 4 Conn. 380-386.
C. R. I. & P. Ry. Co. v. *Sturm*, 174 U. S. 170.
Harris v. *Balk*, 198 U. S. 215, 25 Sup. Ct. Rep. 627.
Kline v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226.
Cole v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538.
National Bank v. *Indiana Banking Co.*, 2 N. E. 401.
Reeve v. *Smith*, 113 Ill. 477.
Martin v. *Dryden*, 6 Ill. 187, 213.
Corbin v. *Graves*, 27 Fed. 644.
Walker v. *Garland*, 285 S. W. 1078.
Leaks v. *Seaboard Airline Ry.*, 60 S. E. 343.
Rood on Garnishment, Sec. 11.
1 Lewis' Sutherland on Statutory Construction, page 283.
State Bank of Chicago v. *Thweatt*, 111 Ill. App. 599.
U. S. Constitution, Art. 4, Sec. 1.
Illinois Attachment Act, Sec. 37.

Argument under First Assignment of Error.

The majority of the circuit court rested their opinion reversing the judgment of the district court primarily upon the proposition that the full faith and credit clause of the United States Constitution required that the inchoate Illinois proceeding be given the effect of a final judgment definitely awarding the entire funds in controversy in this cause to the satisfaction of Armour's claim against Sanders. This conclusion is reached despite the lack of

any final judgment in the Illinois proceeding perfecting the creditor's alleged "lien", which is admitted by the circuit court to be inchoate and defeasible (R. 225), or even a judgment establishing the creditor's alleged claim against his principal debtor.

The full faith and credit clause of the United States Constitution (Art. 4, Sec. 1), after prescribing in general terms that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, leaves the specific enforcement of the clause up to statutory enactment by Congress. This power has been exercised by Congress, and the statute on this point (28 U. S. C. A., Sec. 687) is clear. The judicial proceeding relied upon by Armour in this case is to be given only such faith and credit as it would be entitled to by law or usage in the courts of Illinois. The first pertinent inquiry in this case is, therefore, what faith and credit would be given to the Chicago proceeding in an Illinois court?

We believe that the case of *Lancashire Insurance Company* v. *Corbetts, supra*, is a clear statement by the Illinois Supreme Court of the effect ascribed by that court to the mere institution of a garnishment proceeding in Illinois prior to the rendition of final judgment in such suit. In that case a garnishment was run in Illinois by an Illinois creditor on an insurance company which was doing business in Illinois and Wisconsin. Subsequently, a garnishment was run on the same company, and on the same debt in Wisconsin, which court proceeded to render judgment on its garnishment suit, disregarding the pendency of the Illinois proceeding. The insurance company then plead in Illinois its payment of the Wisconsin judgment, in bar of the Illinois garnishment. The Supreme Court of Illinois held that this was a good bar, and in the course of its discussion pointed out that in its judgment the mere pendency of a garnishment proceeding in Illinois prior to the rendi-

tion of final judgment therein was not entitled to any credit in the courts of another State. The court held that the Wisconsin court was a court of coordinate jurisdiction with the Illinois court, and that it had just as much right to proceed with the trial of its garnishment suit as the Illinois court had to proceed with its case.

In a subsequent case, *Becker* v. *Illinois Central R. R. Co.*, *supra*, the Supreme Court of Illinois, consistent with its prior holding in the Lancashire case, held that the institution and pendency of a garnishment proceeding in Missouri which had not been reduced to final judgment was no bar to a suit by the creditor against his debtor in Illinois. In this case the Illinois Supreme Court said:

> "By the service of the garnishee's summons in Missouri, Miller (the Missouri creditor) acquired a contingent or inchoate lien upon the debt and appellant could not thereafter make a voluntary payment to the appellee; but the right which Miller acquired was dependent upon subsequently obtaining judgment, and that was not accomplished until a judgment had been recovered in this State, where the debt was free from any right or claim. The law of this State for the protection of the wage earner who has a family and resides with the same, exempts his wages from garnishment to a certain amount, and it is the policy of the State to enforce within its own borders the laws made for the benefit of its citizens."

In 28 C. J. 252, we find the following statement:

> "It would seem that unless the statutes expressly so provide the service of a writ of summons in garnishment or trustee process does not in the strict sense create a lien upon any specific property in the hands of the garnishee or trustee but gives rise only to a contingent personal liability to respond thereafter to any judgment which may thereafter be recovered by plaintiff against defendant."

This statement is borne out authoritatively by the Illinois decisions on the subject. In *Bigelow* v. *Andress, supra,* the Supreme Court says on page 332 (referring to property in the hands of the garnishee):

> "The garnishee still has the right to retain it, and by the service, only becomes liable to account for it, or its proceeds, if judgment shall be rendered against him on the trial."

Again, on page 33, the court says:

> "These provisions all repel the presumption that the legislature designed to create any lien upon, or place the property in the hands of the garnishee in the custody of the law."

In *McElwee* v. *Wilce, supra,* the court of appeals says:

> "The service of the garnishee writ on Wilce did not create a lien in favor of McElwee and Company, the creditor, upon the monies in Wilce's hands. By it there was created a personal liability of Wilce to respond to any judgment that might be proved against him, but nothing more."

The circuit court recognizes indirectly that under the decisions above referred to, the law is definitely established in Illinois that the institution of a garnishment proceeding in that State affixes no lien, impounds no *res*, and is entitled to no faith and credit in the courts of other States unless and until it has been reduced to final judgment. The court held, however, that this interpretation of Illinois law by the Supreme Court of that State was an incorrect interpretation; that under the Federal decisions the institution of a garnishment proceeding was entitled to full faith and credit in the courts of other States, and that "The Federal cases are controlling, and establish that the incomplete garnishment proceeding in Illinois has the effect of a lien, and

that full faith and credit in other States and in Federal courts require that like effect be given it in them."

In *Robertson* v. *Pickrell, supra,* it is said on pages 408-9 of the Supreme Court Reporter:

> "The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Health* v. *Columbia College,* 17 Wall. 529."

In *Union & Planters Bank* v. *Memphis, supra,* the contention was made that a certain judgment in the State court of Tennessee furnished an effective bar to the cause of action involved in the case under consideration under the principle of *res adjudicata.* Mr. Chief Justice Fuller, in disposing of this contention, said on page 608 of the Supreme Court Reporter:

> "As the judgment pleaded had no force or effect in the Tennessee State courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can accord it no greater efficacy."

In *Covington* v. *First National Bank, supra,* a question very similar to that involved in the Union and Planters Bank case was again before the Supreme Court, and again this Honorable Court affirmed the principle that regardless of the effect attached to a Federal judgment on a similar question, which effect apparently differed from the State rule, the effect to be given to a State judgment, when relied on in the Federal court, could be no greater than was

accorded to it by the courts of the State where it was rendered.

In *Free* v. *Western Union Telegraph Company*, 147 N. W. 1040, the Supreme Court of Wisconsin said:

> "The highest evidence of what faith and credit a judgment has in the State of its origin is the decisions of the court of last resort of that State."

Writ of error in the above case was dismissed by this Honorable Court, 37 S. Ct. Rep. 20, 242 U. S. 613, 61 L. Ed. 527.

In *Bruce* v. *Ackroyd*, 110 A. 835, 95 Conn. 167, the Supreme Court of Connecticut said:

> "There can be no doubt but that any State may determine for itself what are the essentials of a judgment of record in its own courts. If the record discloses such essentials as to entitle it to recognition as a judgment in a domestic court, it is, under the United States Constitution and the statute, entitled to the same recognition in the courts of other States. Conversely, it must follow that if the domestic courts would not recognize the record as establishing a judgment, it cannot be given that effect in any other State."

We submit that under the authorities cited, as well as under the uniform prior holdings of this Honorable Court, the law of any State as interpreted by its Supreme Court is binding upon the Federal court, and the decision of the circuit court in the case at bar, ascribing to the Illinois garnishment proceeding the effect of an established lien upon the funds in controversy, despite the fact that no such effect is accorded to it under the laws and usage of Illinois, is without judicial precedent or legal warrant.

It seems to us that the interpretation placed upon the Illinois proceeding by the Illinois courts as above set out should be conclusive of this matter. Those decisions clearly

do not warrant the contention that the incomplete garnishment proceeding created an effective claim to the funds in controversy which had to be honored in Texas, and we believe that this Honorable Court should grant the writ of certiorari prayed for herein for the purpose of correcting the erroneous assumption by the circuit court that it had the right to correct the Illinois Supreme Court in its interpretation of Illinois law, and to give to the garnishment proceedings in question the effect which it, the circuit court, thought that it should have under the laws and usage of Illinois.

It seems to us, however, that not only is the decision of the circuit court at variance with the established law of Illinois, but that that court has also erred in its interpretation of prior decisions of this Honorable Court as sustaining the position taken by it that the incomplete garnishment proceeding must be honored as an award of the garnished debt to the Illinois plaintiff.

The question as to what character of judicial proceedings must be given full faith and credit under the Federal Constitution has been the subject of numerous comments by courts and text writers, all of whom impliedly hold that this phrase refers only to a final judgment, and most of whom expressly so state. By the term "final judgment" as so used, is meant not necessarily one from which no appeal has been taken to a higher court, but a definite judgment upon the merits of the controversy, finally disposing of it so far as the trial court is concerned. In Black on Judgments, at page 1039, the author states:

> "It is well settled, upon the authorities that the pendency of a suit in one State cannot be pleaded in bar or abatement of a second action in another State between the same parties and for the same cause of action; nothing but a definitive judgment on the merits, merging the demand, can produce that result."

Again, on page 1042, he says:

> "We are, therefore, next to consider judgments of a sister State as a cause of action. And in the first place, a judgment, to be available for this purpose, must be a valid, subsisting and final adjudication. It must be capable of enforcement and fit to serve as the foundation for final process, in the State where it was rendered."

In 34 *Corpus Juris*, 1105, the statement is made:

> "In order that an action may be maintained in one State upon a judgment recovered in another State, it is necessary that the judgment should be a valid and final adjudication, remaining in full force and virtue in the State of its rendition and capable of being there enforced by final process. Such judgment must be of a nature to create a definite and absolute indebtedness against the judgment defendant, and must have been rendered by a Court having jurisdiction of the parties and the subject matter."

In 15 R. C. L. 900 the statement is made:

> "A judgment must be final before an action on it can be sustained. * * * A final decree is one which determines and disposes of the whole merits of a cause before the Court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no questions for future determination. If findings of fact on any material matter involved in the case are left open for the future determination of the Court, the decree is not final until that determination is concluded. A judgment to be final must be complete and definite in its nature, and must be certain or capable of being made so."

In *Aldrich* v. *Kinney, supra*, an early decision on the point which is much quoted, the statement is made:

> "'Records and judicial proceedings' are such and such only, as are duly rendered by a court of compe-

tent jurisdiction, against those who appear to defend or who are legally notified to appear."

We do not understand the case of *C., R. I. & P. Railway Company* v. *Sturm, supra,* relied upon by the circuit court, to be at variance with the foregoing generally accepted rule. In that case an Iowa creditor of a Kansas employee of the railway company filed a garnishment suit against the railway company in Iowa and secured a judgment in the justice court, which was appealed to the district court. This proceeding was plead by the railway company in defense of a suit against it by its employee in Kansas, where the wages were exempt to him, and was declared by the courts of Kansas to constitute no defense to such action. It will be noted from the report of the case in the State Court, 49 Pac. 337, that the Railway Company did not even attempt to plead the mere pendency of the garnishment proceeding against it as a defense in its employee's suit. It waited until a definitive judgment had been rendered in the garnishment suit, and then plead such judgment in the Kansas suit. True, that judgment was on appeal, and for that reason the Railway Company was only entitled to an abatement of the Kansas suit pending final determination of the appeal, but the case is essentially different from the case at bar, in that a definitive judgment had been rendered in the garnishment proceeding in the Sturm case by the court before whom it was brought, which judgment, under the authorities above quoted, was entitled to full faith and credit in the courts of Kansas.

We do not believe that the circuit court is correct in its assumption that this Honorable Court is opposed to the rule laid down by the Illinois Supreme Court in the Becker and Lancashire cases, *i. e.*, that an incomplete garnishment proceeding, not reduced to final judgment, should have no effect whatever upon the exercise of jurisdiction by another court in another State over a controversy concerning a debt

lawfully brought before it, except, of course, to serve as a basis for a bill of interpleader, where that relief is possible. On the contrary, this Honorable Court cited the Lancashire case with approval in its decision of the case of *Harris* v. *Balk, supra,* at page 627, Supreme Court Edition. We believe, furthermore, that the principle stated by Justice Sutherland of this Honorable Court in *Kline* v. *Burke Construction Company, supra,* on page 81 of the Supreme Court Edition, is in accord with such view. In that case, after pointing out that where a court has taken into its jurisdiction a specific thing, that *res* is withdrawn from the power of other courts of coordinate jurisdiction, Justice Sutherland continues:

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way, and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res judicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."

The case of *Cole* v. *Cunningham, supra,* is in our opinion a still more definite and applicable decision by this Honorable Court in conflict with the decision of the circuit court in the case at bar. In that case a garnishment proceeding

had been instituted in the State of New York, and a court of Massachusetts having personal jurisdiction over the plaintiff in the New York proceeding permanently enjoined him from prosecuting his suit to final judgment. The attaching creditor plead that the full faith and credit clause required that his New York proceeding be recognized in Massachusetts as creating a prior claim in his favor upon the garnished debt. In discussing this point, this Honorable Court said on page 543 of the Law Edition:

> "An attachment is in the nature of, but not, strictly speaking, a proceeding *in rem*, since that only is a proceeding *in rem* in which the process is to be served on the thing itself. If in an attachment suit, the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. *Cooper* v. *Reynolds* (77 U. S.), 10 Wall. 308, 318. The lien is inchoate, and the property attached to await the result of the suit. If a judgment for the plaintiff is obtained, the lien becomes perfected and the property is applied to satisfy the judgment. If plaintiff fails in his action, the lien falls with it. And he may so fail by reason of the discharge of the defendant in insolvency, when he is a citizen of the same State, or has made himself a party to the proceedings in insolvency, or by the action of other courts of the State where the suit is pending, or elsewhere, if jurisdiction *in personam* be obtained. So that, after all, the inquiry is, whether in a proper case the equity courts of one State can control persons within their jurisdiction from the prosecution

> of suits in another. If they can, in accordance with the principles of equity jurisprudence and practice, no reason is perceived for contending that the Constitution of the United States prescribed any different rule. And the determination of what is a proper case for equity interposition would seem to be reposed in the court whose authority is invoked, though some remarks in that regard may not improperly be made."

The only distinction that can be made between the case of *Cole* v. *Cunningham* and the case at bar is that in the Cole case the jurisdiction to permanently enjoin the prosecution of the garnishment proceeding arose because the plaintiff in garnishment was a citizen of Massachusetts attempting to evade the laws of his own State, whereas in the case at bar the prosecution of the garnishment proceeding was permanently enjoined as a protection against double liability and harassment of the insurance companies. We submit that this distinction is not material. This Honorable Court did not make its decision in the *Cole* v. *Cunningham* case depend upon the ground on which the court issuing the injunction obtained jurisdiction, but simply upon its having personal jurisdiction and a valid ground for the issuance of injunction. If the institution of the garnishment proceeding in New York actually fixed a lien upon the debt, as claimed by the majority of the circuit court below, the Massachusetts court would have been just as much bound to recognize that lien and to enforce it, even against its own public policy and statutory law, as the Texas court would be bound to recognize and to enforce the Illinois "lien" in violation of its established policy and constitutional and statutory law.

So far as its alleged applicability to the case at bar is concerned, we believe that Judge Hutcheson is entirely correct in his comment on the Sturm case:

"But it is said by the majority that in *Chic. & R. I. Ry.* v. *Sturm*, 174 U. S. 170, it was held that a garnishment proceeding created a lien, and that courts in the state of the exemption must give effect to the lien so created.

"With all due deference, the Sturm case decided no such thing. It was a suit in which a defendant, against whom judgment in garnishment had gone in Iowa, sought to stay the suit of the creditor of the principal defendant in Kansas until the garnishment proceeding could be finally determined. Proceeding in that case upon the erroneous view that the garnishment in Iowa had seized a debt having a *situs* there, because the garnishee lived there, it did hold that in order to save the garnishee double liability he was entitled to a stay of the suit of the principal defendant for the debt after judgment had gone in the garnishment suit: It did not hold, the question was not before it, that a Federal court in the State of the exemption having jurisdiction of both the principal creditor and the garnishing creditor in an interpleader suit filed by the garnishee, would be compelled to recognize an inchoate garnishment proceeding in another State, brought there on a Texas obligation to defeat Texas exemption laws, as superior to the exemptions granted by the laws of Texas. It did not hold that a Federal court having complete personal jurisdiction of two claimants, neither of whom had obtained a judgment, would be bound by the full faith and credit clause, to render a judgment on a Texas contract in favor of one of them, who, contrary to the fundamental public policy of the State of Texas, had resorted to another State to defeat its exemption laws" (R. 237-238).

To this comment we would add that while it is desirable to protect an innocent debtor who is being harassed by two independent suits in different jurisdictions concerning the same debt, as was done in the Sturm case, the necessity for protection by permitting one action to be plead in abate-

ment of the other fails when both plaintiffs are subject to the power of a court of competent jurisdiction in an interpleader proceeding. Under such circumstances, especially, there is no excuse whatever for a rule which makes the filing of a suit on a claim, accompanied by a garnishment proceeding, the equivalent of a judgment awarding to the plaintiff all of the relief asked for by him, thus precluding both the principal debtor and the garnishee from any trial on the merits, and which makes the pendency of such a suit and garnishment, not grounds for abatement to await final judgment, but a requirement that a court of competent jurisdiction in another State must give to such proceeding the effect of such judgment as it thinks that the court in whose jurisdiction the garnishment proceeding was instituted would have rendered.

In this connection, we would point out that the District Court in Texas did not have before it a sufficient record of facts from which it could determine definitely what judgment would have been rendered by the Illinois court. It will be noted that Section 37 of the Illinois Attachment Act (R. 145) provides that all judgments in attachments against the same defendant returnable at the same term shall have, pro rata, according to the amount of the several judgments, in the proceeds of the property attached, either in the hands of a garnishee, or otherwise. This provision has been interpreted by the Illinois Supreme Court in *National Bank* v. *Indiana Banking Company, supra,* as well as in *Reeve* v. *Smith, supra,* as requiring that the fund or debt attached shall be held subject to *pro rata* distribution among all attaching creditors of the same debtor whose writs are returnable to the same term of court. There is no certificate anywhere in the record of this case that no creditors other than Armour had filed attachment suits against Sanders and the garnishee insurance companies, returnable to the same term of court.

In the absence of such certificate, there is absolutely no justification for the judgment of the circuit court awarding the entire funds garnished to the satisfaction of Armour's claim, because there was and is no way for that court to determine from the record before it whether Armour's pro rata share of the garnished fund would have been the entire fund, or one-half of it, or less. We respectfully submit that if the pending garnishment proceeding is to be given any faith and credit at all in Texas, it is not definite enough, as to the amount to be subjected to Armour's claim, to serve as a basis for a suit in Texas. As is pointed out in *Martin* v. *Dryden, supra,* an independent claimant might have intervened and proven himself entitled to the whole of the fund. In *Corbin* v. *Graves, supra,* a creditor of a firm secured a decree in equity against one of the partners, ordering that partner to pay into court a fixed sum for distribution as the court might order. One of the firm's creditors sued that partner on this decree, and the court held that since the decree did not determine what portion of the fund should belong to the plaintiff, the decree was not sufficiently definite to furnish the basis of a suit.

In *Walker* v. *Garland, supra,* Walker brought suit in Texas on an Oklahoma judgment which gave him judgment against the Texas defendant in a fixed sum, which judgment was decreed to be a lien on real estate, subject to a first lien upon which decree of foreclosure was to be rendered in said Oklahoma suit. The order of sale awarded Walker was made subject to the decree which was thereafter to be rendered with reference to the first lien. The court pointed out that this judgment was not final and was too indefinite to be collected by resort to other sources until the mortgaged property was sold and the proceeds thereof credited on that judgment.

We respectfully submit that the court in the Illinois proceeding has not determined what portion, if any, of the indebtedness owed by the insurance companies to Sanders was to be awarded to Armour; that the facts before the district court, as well as the appellate courts in this cause are entirely inadequate for them to determine what final judgment would have been awarded to Armour in Illinois had the case been allowed to proceed there to a finality, and that for this reason, also, the Illinois record is wholly inadequate to establish any claim in favor of Armour to the fund here involved.

The error of the Circuit Court becomes all the more apparent when we consider the fact that a garnishment proceeding is purely a statutory remedy, and that the institution of a garnishment proceeding does not give the garnishing creditor a vested right to the relief which he is seeking, even in his own State. This is well and ably pointed out in an extensive and well-considered opinion by the Supreme Court of Georgia in the case of *Lears* v. *Seaboard Air Line Railway Company, supra,* in which case the garnishing creditor undertook to subject to the payment of his claim wages due to his debtor from an interstate railroad, which wages were earned, due, and payable in North Carolina. Under the Georgia law at the time that the writ of garnishment was served on the railway company, the garnishing creditor had a right to subject such debt to his claim; but after the institution of the suit and service of the writ, a Georgia law took effect saying that the writ of garnishment should not be used to subject wages of persons residing outside of Georgia and there earned. The Supreme Court of Georgia held that this law deprived the plaintiff of all right to foreclose on and to perfect its inchoate lien. The court quoted with approval some language by the Supreme Court of Minnesota with reference to the perfection

of a mechanic's lien in that State. The plaintiff had given notice and filed his petition for a lien, as prescribed by statute, but before the lien had been perfected by judgment the statute was repealed without a saving clause. It was held that the repealing statute was applicable to plaintiff's case, and that his lien was lost, the court saying:

> "The lien of a mechanic, builder, or material man upon a building and real estate does not arise out of his contract, but depends upon a statute alone for its existence. It is a preference which he may secure if he proceeds in a particular way; but if, before he has fully perfected these proceedings, the Legislature sees proper to repeal the law, he really loses nothing. He is merely unable to secure an advantage which, without the statute, he is in no wise entitled to."

The Georgia court further quotes on page 346 a very pertinent excerpt from Rood on Garnishment, Section 11.

> "Inasmuch as garnishment statutes create no new rights or liabilities, and are purely remedial, they are not retroactive when applied to suits commenced after the passage of the act though relative to former transactions. A person does not by commencement of suit under them acquire a vested right to pursue the statutory remedy, and therefore the Legislature may deprive the plaintiff of the benefits of his garnishment by changing or repealing the law at any time before he has reduced it to judgment."

The Georgia court also quotes with approval the following statement from I Lewis' Sutherland on Statutory Construction, page 283:

> "Rights dependent on a statute and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute."

Illinois already has a statute granting to nonresidents in Illinois the same exemption rights as to wages due them

that they are allowed by the statutes of their home States. Bearing in mind the fact that no final judgment has been rendered in Armour's garnishment suit in Illinois, should the legislature of that State pass a law extending such exemption privileges to non-residents to include all exemptions to which they are entitled by the laws of their home States, such law would be an effective bar to the right of Armour to secure any character of judgment against the insurance companies in the Chicago proceeding. In that event we should have the anomalous situation of a Texas court being forced to award a sum of money to an Illinois creditor in violation of its own exemption laws, which the Illinois creditor could not subject to his claim in the courts of his own State.

It seems to us that the bankruptcy cases cited in the opinion of the Circuit Court (R. 225, 230-231) are wholly foreign to the issues in this case. The current Bankruptcy Act provides (Sec. 107-*c*) that a lien created by, or obtained in, or pursuant to any suit or proceeding at law or in equity which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication under certain circumstances. By its own terms, this provision does not invalidate a lien obtained under a suit begun more than four months prior to the filing of the petition in bankruptcy, and the courts, as a matter of statutory construction, have ruled that there is no authority given in the Act to enjoin any creditor of the bankrupt from prosecuting his suit begun more than four months prior to the filing of the petition to a final judgment. Under these circumstances a creditor of the bankrupt naturally has a right to prosecute his suit to final judgment and effect unless he is barred by some principle or provision of law other than the United States Bankruptcy Act which does not attempt to interfere in any way with such suit, and such judgment, when obtained, per-

fects the inchoate right obtained through service of the writ of garnishment, and is entitled to full faith and credit.

The record of the Illinois proceeding does show the entry of an interlocutory order of default against Sanders, based not upon personal, but upon constructive service upon Sanders outside of the State (R., pages 115-116). We argued the proposition in our brief in the circuit court that this interlocutory order was not a final judgment (pages 12-16), citing among other authorities the case of *State Bank of Chicago* v. *Thweatt*, 111 Ill. App. 599, which case specifically held that such an order was interlocutory and not final. We feel that we are justified in treating the record of the Illinois proceeding as showing the absence of a final judgment in the case without extensive argument of that point to this Honorable Court, because the majority of the circuit court (R. 225) conceded the fact that the alleged "garnishment lien" was inchoate and subject to defeat if final judgment should fail either as to the main debtor or as to the garnishee.

The record relied upon by Armour in this case as establishing its right to have the funds impounded in Texas awarded to it, is the record of a suit instituted by it in Illinois, seeking the recovery of a personal judgment against the insurance companies, requiring them to pay to Armour the amounts of their respective debts to Sanders. The further prosecution of that suit in Illinois has been permanently enjoined. It should be borne in mind that Armour's suit in Texas was not upon promissory notes executed by Sanders, but upon an alleged Illinois judicial determination that the insurance companies' indebtedness was subject to Armour's claim. This issue was disputed by the insurance companies and was never determined by the Illinois court. As stated by this Honorable Court in *Cole* v. *Cunningham*, *supra*, page 541 of the Law Edition:

"The Constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the States domestic judgment to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other States, and they enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments. *And other judicial proceedings can rest on no higher ground.*"

We submit that the district court sitting in Texas had full jurisdiction to determine the ownership of a fund paid into its registry by the insurance companies, according to its own law, and that the fact that a prior action had been instituted in Illinois involving the same subject matter did not, and could not, place any obligation upon a Texas court to apply the remedial laws of Illinois to its decision in preference to the laws of the forum.

Authorities under Second Assignment of Error.

Story on Conflict of Laws, 8th Edition, Secs. 556 and 558.

Wharton on Conflict of Laws, Vol. 2, page 1433.

Dicey on Conflict of Laws, 2nd Edition, page 708.

Scudder v. *Union National Bank*, 91 U. S. 406, 23 L. Ed. 245.

Lanahan v. *Sears*, 102 U. S. 318, 26 L. Ed. 180.

Bronson v. *Kinze*, 1 Howard 311.

Mason v. *U. S.*, 260 U. S. 545, 67 L. Ed. 396, 43 Sup. Ct. Rep. 200.

Bank of U. S. v. *Donnally*, 8 Peters 361, 8 L. Ed. 974.

Pritchard v. *Norton*, 106 U. S. 134, 27 L. Ed. 107, 1 Sup. Ct. Rep. 102.

Vogel v. *Thiesing*, 55 Fed. (2) 205.
28 U. S. C. A., Sec. 41 (26).
28 U. S. C. A., Secs. 725, 726, 727.
U. S. Equity Rule 23.
Logan v. *Goodwin*, 104 Fed. 490, 43 C. C. A. 658.
Thompson v. *McConnell*, 107 Fed. 33, 46 C. C. A. 124.
Art. 16, Sec. 50, Constitution of State of Texas.
Art. 3832 R. C. S. Texas.
Cameron v. *Fay*, 55 Tex. 58.
Cole v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538.
Chase v. *Swayne*, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. R. 742.
Sorenson v. *City Nat. Bank*, 49 S. W. (2) 718.

Argument under Second Assignment of Error.

On pages 10 and 11 of its opinion (R. 230) the Circuit Court announces as its reason for disregarding the remedial provisions of the Texas law exempting to Sanders the fire insurance proceeds of his homestead the following principle:

> "We do not think the filing of the Federal interpleader and the payment thereunder of the money into the District Court in Texas operated to bring it under the dominion of Texas law. The applicant for interpleader often has a choice of forum, and he cannot at his will subject the rights of the contesting claimants to one set of laws rather than another. The purpose of the interpleader statute was to give the stakeholder protection, but in nowise to change the rights of the claimants by its operation. The interpleader is a suit in equity; and equitable principles and procedure are the same throughout the Federal jurisdiction. The court is to weigh the right or title of each claimant under the law of the State in which it arose, and determine which according to equity is the better. The decision should be the same whether the interpleader is filed in Illinois or in Texas. No one's rights are

> intended to be altered by paying the fund into the court, which as an impartial neutral is to determine them."

We have devoted a great deal of time and research endeavoring to find where the principle of law here announced has ever been urged, contended for, or noticed by any text writer on the subject, or by a prior decision of any court. Counsel for Armour made no such contention to the court. The court cites as authority for the rule only its prior decision of *Vogel v. Thiesing*, 55 Fed. (2d) 205, which we will refer to a little further on. We have examined *Corpus Juris*, Ruling Case Law, L. R. A. and A. L. R., the American Digest Systems and all the text writers available to us in the largest law libraries of Dallas, and have found no mention anywhere of the existence of such a principle of law.

The authorities we have examined negative in the most comprehensive terms the existence of such an exception to the established rule that matters of procedure are to be governed wholly by the law of the forum. In Story on Conflict of Laws, Section 556, the author states:

> "We are next led to the consideration of the question in what manner suits arising from foreign causes are to be instituted and proceedings to be had until final judgment. Are they to be according to the law of the place where the parties or either of them live? Or are they to be according to the modes of proceeding and forms of suit prescribed by the laws of the place where the suits are brought? Fortunately here there is scarcely any ground left open for controversy, either at the common law or in the opinions of foreign jurists, or in the actual practice of nations. It is universally admitted and established that the forms of remedies and the modes of proceeding and the execution of judgments are to be governed solely and exclusively by the laws of the place where the action is

instituted, or, as the civilians uniformly express it, 'according to the *lex fori.*' "

Again, in Section 558, the author states:

> "The doctrine of the common law is so fully established on this point that it would be useless to do more than to state the universal principle which it has promulgated. That is to say, that, in regard to the merits and rights involved in actions, the law of the place where they originated is to govern. But the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act."

In Wharton on Conflict of Laws, page 1433, the author says:

> "The third rule announced by the United States Supreme Court in the case of *Scudder* v. *Union National Bank* (91 U. S. 406, 23 L. Ed. 245) namely, that matters respecting the remedy depend upon the law of the place where the suit is brought, is universally conceded."

A still more emphatic statement of the principle is made by the eminent English author, A. V. Dicey, in his work on Conflict of Laws, Second Edition, page 708, wherein he attempts to formulate the underlying principles of conflicts of laws into a series of rules, with comments on each rule, as follows:

> "Rule 193: All matters of procedure are to be governed wholly by the local or territorial law of the country to which a court wherein an action is brought, or, other legal proceeding is taken, belongs (*lex fori*).
>
> In this Digest, the term 'procedure' is to be taken in its widest sense, and includes (*inter alia*)—
>
> (1) Remedies and process; (2) Evidence; (3) Limitation of an action or other proceeding; (4) Set-off or counterclaim.

"Comment: The principle that procedure is governed by the *lex fori* is of general application and universally admitted, but the courts of any country can apply it only to proceedings which take place in, or at any rate under the law of that country. In a body of Rules, therefore, such as those contained in this Digest, which state the principles enforced by an English Court, the maxim that procedure is governed by the *lex fori* means in effect that it is governed by the ordinary law of England without any reference to any foreign law whatever. The maxim is, in effect, a negative rule. It lays down that the high court, in common, it may be added, with every other English court, pursues its ordinary practice and adheres to its ordinary methods of investigation, whatever be the character of the parties or the nature of the cause which is brought before it."

The statements made by the authors quoted above are accepted, recognized, and approved by this Honorable Court in the cases of *Bank of U. S.* v. *Donnally, supra; Scudder* v. *Union National Bank, supra,* and *Pritchard* v. *Norton, supra.*

In view of the unanimity of all of the authorities we have been able to discover on this point, we are at a loss to understand the exception set up by the Circuit Court to the general rule, in the case of interpleader suits. It seems to us that all of the objections urged by Story, in sections following or adjacent to the ones quoted above against the acceptance of any different rule, apply just as forcibly to interpleader suits as to any other character of suit. Particularly objectionable, it seems to us, is the uncertainty which would be cast into the law by the adoption of the rule stated by said court. If a trial court in an interpleader suit has the right to adopt the law of any State which may have any relation to the matter in dispute, and to choose which one of the various conflicting remedies appeals to it as being the more equitable, no party to an interpleader

dispute can tell by what principle of law his property rights will be determined. Surely certainty as to the rule of decision in any given case is to be desired, and this can be accomplished only by applying the remedial laws of the forum to the decision of the case.

The case of *Vogel* v. *Thiesing, supra,* a prior decision of the Circuit Court, is, in our opinion, not an exception to the general rule above referred to. The conflicting laws in that case were not procedural, but substantive, and there is no question but that any court in passing upon substantive rights must apply the law of the jurisdiction or jurisdictions in which those rights arose. The Texas court in that particular instance was merely a forum to determine substantive legal rights acquired under foreign laws with no conflicting procedural remedies involved.

With reference to the Circuit Court's observation that a plaintiff in interpleader often has a choice of forum, we do not see that that should operate as a reason to compel the court of the forum to administer foreign remedies. We would point out, in the first place, that the forum in this instance was not left to the choice of the plaintiffs, but was definitely fixed by Federal law (28 U. S. C. A., Sec. 41 (26)). Plaintiffs do not always like the procedural laws of the forums in which they have to litigate their claims, but they are compelled to resort to them because they are the only jurisdictions within which they can obtain relief. There is nothing unjust about compelling Armour to litigate its claim against Sanders in Texas, because that must have been the forum in which it was contemplated at the time the parties originally dealt together that any claim against Sanders would have to be litigated.

We take it that no citation of authorities is necessary in support of the statement that garnishment proceedings, as well as rights of exemption, are procedural and remedial rights. Section 726 of Title 28, U. S. C. A., expressly pro-

vides that in common law causes in the District Court the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant which are now provided by the laws of the State in which such court is held for the courts thereof. Section 727 makes a similar provision as to rights by execution or otherwise to reach the property of the judgment debtor. Section 725 requires that the laws of the several States be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply.

We realize, of course, that this suit originated upon the equity side of the docket. That was true because the relief of interpleader is an equitable remedy. That side of the case, however, has now been terminated, and the question remaining for decision and involved in this appeal is a common law question, *i. e.*, the ownership of a fund of money. Rule 23 of the United States Equity Rules is as follows:

> "Rule 23: MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN. If in a suit in equity a matter ordinarily determinable at law arises, such matters shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

After the determination of the strictly equitable question involved in the suit, that is, the right of the plaintiffs to maintain their bill of interpleader, this case resolved down into a suit involving only a common law question, *i. e.*, the prior right of ownership to a fund of money. It seems to us that the provision of Rule 23 requires that this matter be determined according to the law principles and under the provisions of Sections 725, 726, and 727 of the Judicial Code.

There is, however, a well recognized and established rule of law which is stated by Justice Sutherland of this Honorable Court in *Mason* v. *U. S.*, *supra*, as follows:

> "Subject to certain exceptions, the statutes of a State are binding upon the Federal courts sitting within the State, as they are upon the State courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052. That jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the States. *Neves* v. *Scott*, 13 How. 268, 14 L. Ed. 140. But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by State legislation, the rights involved therein may be the proper subject of such legislation."

The Justice also quotes with approval the following statement from the circuit court in Independent District of *Pella* v. *Beard*, 83 Fed. 5, 13:

> "It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as courts of common law, and that, as a general proposition, the equity jurisdiction of the Federal courts cannot be limited or restrained by a State (citing authorities). But these decisions relate to the practice, the impairing of jurisdiction, rather than to the determination of the rights of parties after jurisdiction has been acquired."

Continuing, Mr. Justice Sutherland says further:

> "It is urged upon the argument that Section 721 of the Revised Statutes (Comp. St. Sec. 1538), which provides that the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States, by implication excludes such laws as rules of decision in equity suits.

> The statute, however, is merely declarative of the rule which would exist in the absence of the statute (citing authorities). And it is not to be narrowed because of an affirmative legislative recognition in terms less broad than the rule. The rule that an affirmative statute, without a negative express or implied, does not take away the common law (Potter's Dwarris 68; Sedgwick Statutory Construction, 29, 30) affords an analogy."

We would also call the court's attention to a statement by Mr. Chief Justice Taney in *Bronson* v. *Kinzie*, *supra*, in which he holds that where a certain remedy is afforded by State law at the time the contract was entered into, such remedy may not subsequently be impaired as to that particular contract because it would constitute an impairment of the obligation of the contract. He does recognize, however, the right existing in the several States to pass exemption statutes which will be binding on the Federal courts, in equity as well as in law, using the following language:

> "This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt, and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions, and they would be obligatory on the parties in the courts of the United States, as well as in those of the State."

If the circuit court intended to hold that a Federal *equity* court sitting in Texas was not bound by the exemption provisions of the Texas Constitution and statutes as interpreted by the Supreme Court of Texas, it seems to us that the case of *Lanahan* v. *Sears, supra,* is a direct and, positive authority to the contrary. In that case Sears, a resident of Texas, had given an absolute deed to his homestead, which deed, however, was intended as security for a debt. Under the decisions of the Texas Supreme Court this was construed as a mortgage, and since the homestead exemption could not be waived, was invalid. Lanahan sued Sears in the United States Circuit Court in ejectment, and Sears then filed his suit in the United States Circuit Court in equity, asking that Lanahan be enjoined from further prosecution of his suit. This Honorable Court held that a Federal equity court sitting in Texas was as much bound to enforce the exemption provisions of the Texas Constitution as construed by its Supreme Court as any State court of Texas would be. It seems to us that this is a direct holding applicable to the case at bar, and that under it the District Court for the Eastern District of Texas was bound to give effect to the Texas exemption law covering the proceeds of appellee's homestead.

We believe the authorities cited make clear the proposition that while Texas cannot by any State statute affect the class of cases which come under the general jurisdiction of a United States equity court, insofar as any Texas statute does not conflict with the United States Constitution or with the rules defining jurisdiction of a United States equity court, it is binding on such court stting within the State of Texas, whether such court be sitting as a court of law or equity. As is pointed out in one of the cases cited, it would indeed be anomalous that a Texas citizen should be entitled to insist upon his homestead exemption

in his State court or in the Federal court at common law, but have no such right in a Federal court of equity.

We submit that under the decision of this Honorable Court in *Cole* v. *Cunningham, supra,* the Federal court, sitting in Texas, and bound as it was to enforce the exemption laws of that State as construed by its highest court, was not obligated to give to the Illinois garnishment proceeding the right of priority to which it would have been entitled in Illinois, but only such right of priority as it was entitled to under the remedial laws of Texas; and that under the Texas laws such writ of garnishment was not effective to create a lien upon, or any right in and to the fire insurance proceeds of the homestead and household goods of appellee W. D. Sanders. *Chase* v. *Swayne, supra; Sorenson* v. *City Nat. Bank, supra.*

Authorities under Third Assignment of Error.

Holden v. *Stratton,* 198 U. S. 214.
Chase v. *Swayne,* 88 Tex. 218.
Ketcham v. *Ketcham,* 269 Ill. 584.
Reames v. *Morrow,* 193 Ill. App. 155.
Sawyer Mfg. Co. v. *Fleming,* 58 N. W. 226.
Strawn v. *First National Bank,* 279 S. W. 474.
Jackson v. *Republic,* 141 Ill. App. 453.
Baltimore & Ohio R. R. v. *McDonald,* 112 Ill. App. 391.
Steele v. *Buel,* 104 Fed. 972.

Argument under Third Assignment of Error.

In asking this Honorable Court to issue the writ of certiorari prayed for herein, we are relying principally upon our first and second assignments of error. It is our view that the decision of the effect to be given to the record of a garnishment proceeding instituted in one State and the prosecution of which has been permanently enjoined

prior to the rendition of final judgment therein, is one of the utmost importance, and that no circuit court decision enunciating an incorrect decision of this important question should be permitted to stand with the implied approval of this Honorable Court. We do not believe that the full faith and credit clause ever contemplated the interpretation placed upon it by the majority of the circuit court requiring that a Federal court in an interpleader case be compelled to give to a suit instituted in another State the effect of such final judgment as the Federal court believes would probably have been rendered in that suit under the laws of that State, had it been permitted to go to final judgment there, despite the fact that the rendition of such judgment is contrary to the established policy and laws of the forum.

In our view, the statement that the court in an interpleader case may reject the established remedial law prescribed by the proper legislative authority of the State in which it is sitting in favor of the remedial rights accorded to the parties by the law of a foreign State, if in the personal opinion of the judge presiding the foreign remedial law is more equitable, is particularly pernicious. It is, in plain fact, an attempt by the court to usurp the province of the Legislature, and to set itself above the law which it is its official duty to enforce. The dual character of our Federal judicial system authorizes no such disregard of the sovereign laws of the State. In our view it is immaterial to a proper decision of this case whether the position of Armour in seeking to evade the Constitutional and Statutory exemption laws of Texas is more equitable than the position of Sanders in claiming the benefit of the exemptions accorded to him by the law of his native State. We cannot pass unchallenged, however, the principle necessarily implied in the majority decision that the policy of

Congress is opposed to the protection of exemption rights granted to their citizens by the respective States. In this connection, we cannot do better than to quote from the dissenting opinion of Circuit Judge Hutcheson (R. 233-234).

> "To the view implicit in the opinion, that the Texas homestead exemption laws are too liberal, and because too liberal the Federal courts justly deny them effect, I oppose not only the observation that it is for Texas alone to determine the level of domestic peace and security which the genius of the State requires and to fix its exemptions accordingly, but the observation that 'It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to State exemption laws.' *Holden* v. *Stratton*, 198 U. S. 214. In that case it was said: 'This was cogently pointed out by Circuit Judge Caldwell, in delivering the opinion in *Steele* v. *Buel*, 104 Fed. 972, where he said: 'From the organization of the Federal courts under the judiciary act of 1789, the law has been that creditors suing in those courts could not subject to execution property of their debtor exempt to him by the law of the state.' * * * The same rule has obtained under the bankrupt acts which have sometimes increased the exemption, but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language.'
>
> "To the view announced by the majority, that exemptions are matters of local law, having in themselves no extra territorial effect, and that they will not ordinarily be enforced in States other than that of their creation, I oppose the settled policy of substantially all the States to insure, by statute and decision, the exemption from seizure for debt of the home and the proceeds of insurance policies on it (*Chase* v. *Swayne*, 88 Tex. 218; *Ketcham* v. *Ketcham*, 269 Ill. 584) and the modern view that comity requires that exemptions allowed in a State be not defeated by suits brought in

another State to avoid them. *Reames* v. *Morrow*, 193 Ill. App.; *Sawyer Mfg. Co.* v. *Fleming*, 58 N. W. 226; *Strawn* v. *First National Bank*, 279 S. W. 474; *Jackson* v. *Republic*, 141 Ill. App. 453; *Baltimore & Ohio R. R.* v. *McDonald*, 112 Ill. App. 391."

If the venue of the interpleader suit in question had been fixed in the State court of Texas, can it be doubted that such State court would have felt entitled and obligated to protect the exemption rights accorded to its citizens by its sovereign law? Is a Federal court sitting in Texas any less bound and obligated to enforce the laws and public policy of the State of the forum? When Armour extended credit to Sanders, it did so with full notice of the fact that it could not, under any normal circumstances, expect to appropriate the homestead and household goods of Sanders to the satisfaction of its claim. It was perfectly satisfied to extend credit to him and to take his note, payable in Texas, upon this basis. We can see no injustice in confining Armour to the enforcement of the remedial rights which were in contemplation at the time the debt in question was created. On the contrary, it seems to us that justice demands that Sanders be protected in the exemption rights accorded to him by the laws of his native State, and which were impliedly agreed to by Armour at the time that it first contracted with him.

Conclusion.

We believe that the majority decision of the Circuit Court is admittedly in violation of the provisions of 28 U. S. C. A. Sec. 687, in that the circuit court expressly gave to the incomplete garnishment proceeding in Illinois a greater effect than was given to it by the established law and usage of that State, on the plea that the Supreme Court of Illinois had incorrectly interpreted the law of that State, and that the circuit court had the right to place its own inter-

pretation upon the law of Illinois in preference to accepting the interpretation of the Illinois Supreme Court. In its holding that the institution of a garnishment suit is the equivalent of a final judgment awarding to the garnishing plaintiff all the relief sought by him in such suit, and that it must be recognized and enforced as such in the courts of a sister State, even though it be in violation of the public policy and laws of such sister State, the decision is squarely in conflict with the prior decision of this Honorable Court in *Cole* v. *Cunningham, supra.*

In the right asserted by the majority of the circuit court to disregard the sovereign laws of the State in which the district court is sitting, whenever the individual judge sitting as such court may consider such sovereign laws to be inequitable, the decision is revolutionary, wholly without precedent, and dangerous in the extreme. We respectfully submit that it is highly important that the erroneous principles of law asserted in the majority opinion be rejected by this Honorable Court, and that this Honorable Court issue the writ of certiorari prayed for in plaintiff's petition herein to that end.

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